MAY 16

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. ~~948~~ 49

MORTON SALT COMPANY,
a Corporation of Illinois,
Petitioner,

vs.

THE G. S. SUPPIGER COMPANY,
a Corporation of Delaware,
Respondent.

BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CLARENCE E. MEHLHOPE,
Counsel for Petitioner.

BARNARD & MILLER, 33 S. Market St., Chicago. FRAnklin 0562

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 946

MORTON SALT COMPANY,
a Corporation of Illinois,

Petitioner,

vs.

THE G. S. SUPPIGER COMPANY,
a Corporation of Delaware,

Respondent.

BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This brief is submitted to direct the Court's attention to several misleading statements in respondent's brief.

Respondent on page 3 of its brief says that *it had no opportunity to rebut the "meager" facts advanced as the basis of the petitioner's motion for summary judgment;* and on the previous page that the Court below held in

effect that *it had not had its day in court. Such assertions are without foundation.*

The record shows that on the 18th day of October, 1939, there was filed in the office of the Clerk of the United States District Court below, in behalf of petitioner (defendant) depositions of Suppiger and Schofield (R. 10), together with paper exhibits Nos. 1 to 12 (R. 31-50). On December 8, 1939, the reply affidavits of Suppiger and Schofield were filed in said District Court in behalf of the respondent (plaintiff) (R. 50). On December 28, 1939, the motion for summary judgment together with the affidavit of Daniel Peterkin, Jr., in behalf of petitioner (defendant) were filed in the District Court (R. 53, 54). Thereafter, the memorandum of Judge Holly on the motion was filed in that Court on January 31, 1940 (R. 56).

In the affidavits of Schofield and Suppiger it was asserted that plaintiff had *sold depositing machines* made under the patent in suit for use other than for depositing salt tablets,—one at Argo, Illinois, and the other at Edgewater, New Jersey. Respondent apparently believed the *sale of two machines not involved in the salt tablet business* was a matter of defense, as stressed in its brief (p. 7). *If it had other and additional matter of defense, why did it not then assert it by the said affiants?*

After the free admission in their depositions *that the profits lay in the salt tablets* and *that the depositing machines were a mere secondary adjunct to that business, it was not incumbent upon petitioner to submit additional evidence to establish that fact.* Certainly the petitioner was not required to submit "testimony to the effect that" the rentals on the patented depositing machines do "not contain a profit" as it is claimed it should have done in respondent's brief, page 8.

It is absurd for respondent to claim or suggest that

it did not have its day in court, or to argue as it does on page 5 that "no opportunity was given the respondent to rebut facts which the petitioner has construed in its favor."

Any income by the outright sale *of the two machines* mentioned in the said affidavits, is immaterial to the attempted monopoly of the salt tablet business under attack in this case. It does not appear in the affidavits when those two machines were sold. They may have been sold the day before the date of the affidavits, for all that appears therein. Reference to this sale was obviously a mere blind to confuse the issue.

On page 7 of respondent's brief it is stated that the petitioner employs a restrictive clause. This refers to the legend on the tag on petitioner's machine which was mentioned on page 4 of the petition. As there stated, *petitioner's depositing machine is not patented.* Petitioner has no patent on its depositing machine by which to attempt to establish a monopoly in the sale of the salt tablets.

As stated in petitioner's (main brief, p. 7): "The matter for determination by this Court is a question of law only."

CONCLUSION.

For the reasons stated in the brief in support of the petition for writ of certiorari, supplemented by those herein, the petition for writ of certiorari should be granted.

Respectfully submitted,

CLARENCE E. MEHLHOPE,
Counsel for Petitioner.

Chicago, Illinois,
May 14, 1941.